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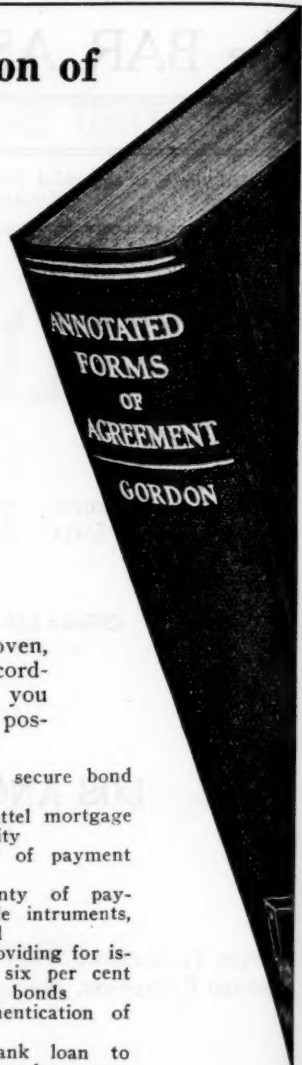
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Appeals from Municipal Courts in Civil Cases*

By HONORABLE HARTLEY SHAW, Judge of the Superior Court, County of Los Angeles.

The last legislature has made a complete revision of the law governing appeals from the municipal courts in civil cases. During my experience of more than a year in hearing these appeals, I have found that the law on the subject, and especially that part of it concerning the record on appeal, is quite puzzling to many persons who are required to deal with it. I hope, therefore, that a discussion of the changes just made in the code provisions may be of interest to readers of the BULLETIN.

The uncertainty which many have felt on this subject has not been without cause in the statutory provisions in regard to it. In 1925 the legislature passed a series of acts to provide for the establishment of municipal courts. One of them related to civil appeals from those courts, and undertook to cover the whole subject, including the procedure for taking an appeal and for preparing a record for use thereon. This was done, for the most part, by reference to and adoption of certain sections of the Code of Civil Procedure relating to appeals from justices' courts on questions of law alone. Experience has proved that the statute so framed is incomplete, incongruous and unsatisfactory in many respects. By other laws passed at the same time the practice of the superior courts was adopted for the municipal courts. The sections which were made applicable to appeals were originally framed with reference to the practice in the justices' courts, and of course do not fit the quite different practice of the superior courts. These sections would probably be unsatisfactory even when applied to appeals from the justices' courts, but on account of the fact that ap-

peals are seldom taken from those courts on questions of law alone, their defects have not become generally apparent and they have remained unchanged for many years. The law did not provide expressly for transmitting the pleadings, the findings, or the judgment or order appealed from to the superior court. The District Court of Appeal for the Second District, Second Division, has remedied this omission by holding that the judgment roll becomes a part of the record on appeal, under the guise of a "docket," (*Mazuran v. Superior Court*, 52 Cal. App. Dec. 674); but this decision apparently does not apply to all appeals so as to cover the entire ground, and while it is as satisfactory as any that could be made on such an incongruous statute, yet its reasoning appears to be subject to some criticism on logical grounds. The provisions regarding the preparation and settlement of a statement on appeal, which were adopted from section 975 of the Code of Civil Procedure, are unsatisfactory in not conferring on the judge any power to settle or correct the statement where no amendments are proposed and in not providing any notice to the parties of the time when the statement will be settled if there are amendments. The latter omission has resulted in numerous complaints to me that appellants had been unfairly treated in the settlement; and in some cases, especially where the appellant's specification of his grounds of appeal, which the statute requires the statement to contain, was omitted on the settlement, there appears to have been reason for these complaints. Various other defects in applying the statute to the subject matter also appeared which need not be further enumerated.

In view of all these defects, I conferred with Judge Henry M. Willis, then presid-

*EDITOR'S NOTE: The 1927 Legislature made a considerable number of important changes in and amendments to our laws. It is the purpose of the BULLETIN to digest as many of these changes and amendments as possible for the benefit of our readers.

Judge Shaw's article is the first of the series of discussions. Other representative experts have been requested to prepare treatments on different phases of this new legislation.

ing judge of the municipal court of the city of Los Angeles, and in collaboration with him undertook to draft an amendment of the law providing for appeals from municipal courts in civil cases. The bill which we framed was introduced into the legislature, passed with some slight modifications, signed by the Governor and became a law July 29, 1927, as Chapter 68 of the statutes of 1927. It amends sections 983, 984 and 985 of the Code of Civil Procedure, which were added to the code by the act of 1925, and also adds new sections numbered 986, 987, 988, 988a, 988b, 988c, 988d, 988e, 988f, 988g and 988h, all relating to the same subject. I know from considerable experience that it is practically impossible to frame at one time a comprehensive statute on any subject without defects and omissions, and no doubt this rule will be found applicable to the amendments framed by Judge Willis and myself; but I believe they will clear up some, at least, of the defects and uncertainties existing in the former law.

The guiding rule by which these amendments were drawn was that since the practice in the municipal courts is the same as that prevailing in the superior courts, the procedure to be followed on appeal from the municipal courts should likewise be the same as that governing appeals from the superior courts, and accordingly the new provisions of the amendments are nearly all merely copies or at least adaptations of provisions of the code relating to appeals from the superior courts. To this rule a few exceptions were made by reason of slight variations in the practice of the two courts or the more limited nature of the jurisdiction exercised by the municipal courts.

The amendments change the statutory description of the judgments and orders from which appeals may be taken. By the former provision of section 983 an appeal lies from the judgment rendered in a civil action and from any special order made after final judgment in such action. I have heretofore held that the latter provision includes orders on motion for a new trial. By the amendment the section provides in part as follows:

"Any party to a civil action in a municipal court, aggrieved by any final judgment entered therein, or by any order discharging or refusing to discharge an attachment, or changing or refusing

to change the place of trial, or by any special order made after final judgment, except an order granting or denying a new trial, may appeal therefrom to the superior court of the county, on questions of law alone."

This amendment cuts off the right of appeal heretofore existing from orders granting or denying a new trial, and extends the right of appeal to orders discharging or refusing to discharge an attachment or changing or refusing to change the place of trial, which have not heretofore been appealable in the municipal courts. The amendatory statute makes no declaration as to the effect of its provisions on pending proceedings, but fortunately many questions which may arise on this point have been decided by the Supreme Court in cases arising on similar amendments of the law relating to appeals to that court, and the following propositions have been established by those decisions.

The right of appeal is governed by the law in force at the time of the making of the judgment or order from which an appeal is sought to be taken. (2 Cal. Jur. 119; *Pignaz v. Burnett*, 119 Cal. 157; *Estate of Hughston*, 133 Cal. 321; *Boin v. Spreckels Sugar Co.* 155 Cal. 612; *San Francisco etc. Railways v. Superior Court*, 172 Cal. 541; *Hirsch v. All Persons*, 173 Cal. 268.)

If a statute depriving a particular judgment or order of its appealable character goes into effect pending an action or proceeding which culminates in such judgment or order after the statute takes effect, no right to appeal from such judgment or order subsequently rendered exists. The cases in which the rule was declared, arose under the amendments of 1915 cutting off the right of appeal from orders of the superior courts made upon motions for a new trial, and they held that such an appeal could not be taken where the order was made after the amendments took effect, although the notice of intention might have been filed before that event. (2 Cal. Jur. 120; *Woodruff v. Colyear*, 172 Cal. 440; *Watterson v. Cruse*, 179 Cal. 379; *San Francisco etc. Railways v. Superior Court*, 172 Cal. 541; *Hirsch v. All Persons*, 173 Cal. 268; *Nathan v. Porter*, 36 Cal. App. 356; *Hester v. McMillan*, 29 Cal. App. 664; *Watt v. Bekins etc. Co.*, 35 Cal. App. 776.)

If no right of appeal exists at the time of the rendition of judgment or order, a

subsequent act providing for an appeal from a judgment or order of the same kind does not authorize an appeal from such judgment or order previously rendered, or have the effect of saving or validating a prior appeal taken from such judgment or order without authority of law. (2 Cal. Jur. 119; *Gates v. Salmon*, 28 Cal. 320; *Peck v. Curtis*, 31 Cal. 207; *Estate of Hughston*, 133 Cal. 321.)

In the case last cited, the rule was adhered to although the order had not been entered until after the law was changed.

Applying these rules to the present amendments, their effect is that an appeal may be taken, within the statutory time of course, from an order of a municipal court granting or denying a motion for a new trial, if the order was made before July 29, 1927, but not if it was made on or after that date; and an appeal may be taken from an order discharging or refusing to discharge an attachment or changing or refusing to change the place of trial if it was made on or after July 29, 1927, but not if it was made before that date.

A change has also been made in the time within which an appeal may be taken. Formerly the time was 30 days after notice of the entry of a judgment or the making of an order. By the new provisions of section 983 an appeal may be taken

"at any time after the rendition of the judgment or making of the order, and within 30 days after notice of the entry of such judgment or making of such order; provided, that if proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until 15 days after entry of an order determining such motion for a new trial, or after other determination in the municipal court of the proceedings upon such motion."

The general rule as to such a change is that the time within which an appeal may be taken depends upon the statute in force at the time of the entry of the judgment or order. (2 Cal. Jur. 120; *Melde v. Reynolds*, 120 Cal. 234; *Pignaz v. Burnett*, 119 Cal. 157.)

The above cited decisions, however, were made in cases where the change in the statute was to shorten the time for taking the appeal. Following the general rule above stated, it might be thought that in case of a judgment entered before July 29, 1927, the time for appeal would be strictly

limited to 30 days after notice of the entry of the judgment, notwithstanding the amendment. But it should be noted that in this case the time for an appeal from a judgment is extended by the amendment until after the decision on a pending motion for a new trial, and by the same statute the previously existing right of appeal from an order denying a new trial is cut off, and the superior court is given the power to review such order on appeal from the judgment (sec. 988h as amended). This is exactly the same change which was made in 1915 in the law relating to appeals from the superior courts. In ruling on the effect of that change the Supreme Court held that where, during the pendency of a motion for a new trial, the time for appeal from the judgment expired under the law in force at the time of its entry, and before the ruling on the motion for a new trial the above-mentioned change in the law took effect, it was the intent of the legislature to preserve to the losing party his right to have the order denying a new trial reviewed on appeal, and that for that purpose his right of appeal from the judgment was in effect revived by the order denying a motion for a new trial and he might take an appeal from the judgment within such time after the order as the new law provided. (*Wilcox v. Hardisty*, 177 Cal. 752). The effect of this decision here seems to be that where a judgment was entered in a municipal court before July 29, 1927, and no appeal has been taken within 30 days after notice to the losing party of the entry thereof, yet, if a motion for a new trial was pending when the time for appeal expired and on July 29, 1927, an appeal may be taken within 15 days after the determination of the proceedings on the motion for a new trial.

In some respects the new law follows that applicable to appeals from justices' courts. One of these matters is the filing of an undertaking for costs on appeal. Section 985 as amended retains the provision that an appeal is not effectual for any purpose unless an undertaking for costs and damages on appeal is filed, and section 986 requires this undertaking to be filed within 5 days after the filing of the notice of appeal, and also requires that notice of the filing of this undertaking be given to the respondent in order to start the running of his time for excepting to the sufficiency of the sureties. This provision as to notice

is new, the respondent's time formerly running from the filing of the undertaking without regard to notice. The provisions of section 985 regarding the undertaking to stay execution on appeal do not follow exactly the provisions regarding such undertakings in either superior court or justices' court cases, the effort being to adopt the more desirable features of the law relating to each, and hence the only safe course in drawing such a bond would be to refer to the statute and follow its language.

The amendments also retain the provision of the justices' court practice that the appellant must, when he files his notice of appeal, pay to the clerk of the municipal court the fees payable to said clerk on appeal and the amount necessary to file the record on appeal in the superior court, and also require the clerk of the municipal court to transmit the record to the superior court within 5 days after the form of the record is finally settled. Here it should be noted that the record will include copies of certain papers, which must be certified to be correct by the clerk or by the attorneys (Sec. 988b). If these papers are to be certified by the clerk, it seems that the \$1.00 fee payable to him on appeal by section 4300L of the Political Code for certifying and transmitting papers on appeal would cover his certificate to these papers, there being no other certificate now required of him on appeal. If the clerk is required to make, as well as certify these copies, then a further fee of twelve cents per folio will be due him under said section of the Political Code.

The law as to the record on appeals is entirely recast by the amendment. Section 988b now provides what the contents of that record shall be, in language which seems quite definite and unmistakable. In case of an appeal from a judgment, the record on appeal "shall consist of copies of the notice of appeal and of the judgment roll and the original of any bill of exceptions settled for use on such appeal." The contents of the judgment roll are prescribed by section 670 of the Code of Civil Procedure, which is a part of the superior court practice adopted for the municipal courts. In case of an appeal from an order, the record on appeal "shall consist of copies of the notice of appeal and of the order appealed from, and the original of any bill of exceptions settled for use on such appeal." The provision that the orig-

inal bill of exceptions, when there is one, is to be sent to the superior court, avoids the unnecessary clerical work of copying it. The same provision could not well be made as to the judgment roll, or the order appealed from in case of an order, or the notice of appeal, because these are records of the municipal court, showing the state of the case in that court, and should be available there at any time for examination.

As just indicated, a bill of exceptions, to be settled under sections 649, 650 and 651 of the Code of Civil Procedure, is substituted for the statement of the case heretofore used, when it is necessary to bring before the superior court any matter not included in the judgment roll or the order appealed from. Although the provisions regarding the statement of the case were brief and not greatly different as to the matters to be set forth from those regarding bills of exceptions, they seem to have been much misunderstood and to have constituted a considerable stumbling block in the preparation of records on appeal from the municipal courts. The method of proceeding by bill of exceptions has been in existence for many years in connection with appeals from the superior courts. The law regarding bills of exceptions has been settled by many decisions of the supreme and appellate courts and should be well known to the legal profession; and the adoption of that method for use on appeals from municipal courts should therefore avoid much of the perplexity which seems heretofore to have existed regarding the records on such appeals. Attention should perhaps be called here to the fact that no provision is made by the new law for preparing a record on appeal under the so-called alternative method—sections 953a, 953b and 953c of the Code of Civil Procedure. The reason for this is that this method of preparing the record requires action by the official reporter, the credit given to the record resting in part on the presumption attending the action of such an official, and there was, at the time these amendments were written, no provision for official reporters in the municipal courts, except on summary proceedings. The last legislature has made such a provision, but this action of course came too late to be considered in drafting these amendments. It will therefore be necessary to make use of a bill of exceptions in all cases where it is desired to make a record other than

the mere judgment roll or the order appealed from. Any record attempted under the provisions of section 953a et seq. will necessarily be ignored on appeal because not made in a manner authorized by law.

A very complete discussion of the law regarding bills of exception, with citations of the decisions, appears in 2 Cal. Jur. pp. 529-584, but perhaps it will not be amiss to recapitulate here some of the rules as to form and contents of bills of exceptions which have been settled by the decisions. Although section 988a expressly refers to and adopts only sections 649, 650 and 651 and does not expressly refer to section 648 of the Code of Civil Procedure, yet I think the provisions of the latter sections must be observed in preparing a bill of exceptions on appeal from the municipal courts. That section is within the general language of section 831d adopting the superior court practice for the municipal courts, there being now no provisions inconsistent therewith in the law relating to appeals. Moreover, that section has frequently been held applicable to bills of exceptions settled under section 650, although it is in no way referred to in the latter section. The principal provisions of section 648 are those requiring a specification of the particulars in which the evidence is insufficient to justify the decision, when that point is to be made on appeal, and those providing that besides the objection only the substance of the reporter's notes and only so much of the evidence or other matter as is necessary to explain the objection shall be stated. The decisions upon the latter provision will be referred to in a subsequent paragraph. The provision requiring specifications is quite important, for it has been uniformly held in a great number of decisions that unless the bill of exceptions contains specifications of the particulars in which the evidence is insufficient to justify the decision, that point cannot be considered on appeal, (2 Cal. Jur. 710, and cases there cited; *Mills v. Brady*, 185 Cal. 317). The case of *Mills v. Brady*, just cited also holds that general statements that the evidence is "insufficient to support the judgment" or "insufficient to justify the findings" or that "the findings are contrary to the evidence" or "the judgment is contrary to the evidence" are wholly insufficient as specifications and do not authorize the appellate court to review the evidence; and further authorities to the same effect are cited in 2 Cal. Jur. 718. It

is, however, sufficient to designate the findings or parts of findings assailed and state that the evidence is insufficient to support them. Evidence on the point need not be stated or repeated in connection with the specification, but of course it must appear in the body of the bill of exceptions. (See 2 Cal. Jur. 713-722, where the form of such specifications is fully discussed.)

The purpose of a bill of exceptions is to place that on record, which without it would not be a part of the record. Hence, items which are already a matter of record, such as the pleadings, findings, notice of appeal and judgment, should be excluded from a bill of exceptions. (2 Cal. Jur. 527, 533; in re *Robinson*, 106 Cal. 493.)

Papers not made a part of the record on appeal by the provisions of the law on that subject cannot be considered on appeal unless included in a bill of exceptions. This rule applies to all exhibits and papers of every kind referred to at the trial, and also, if it is desired to have an order reviewed on appeal, to all notices, affidavits, pleadings, petitions or other parts of the record upon which the order may be based. (*People v. Terrill*, 131 Cal. 112; *Matter of Danford*, 157 Cal. 425; *Hershey v. Bristol*, 162 Cal. 110; *State Bank v. McLaury*, 175 Cal. 31; *Wilmon v. Aros*, 191 Cal. 80.)

In this connection, however, consideration should be given to the provision of section 988b that if there is any paper or record in the custody of the clerk of the municipal court which was before that court but is not included in the record, and an examination of the paper or record will assist in the determination of the appeal on its merits, the superior court may require the production of a certified copy of such paper or record, which shall thereupon be deemed a part of the record upon appeal. This provision is borrowed from section 963, but is comparatively new there, and its effect has not been much considered by the supreme court. It seems quite possible that it may be sufficient to authorize the court on appeal to order the production of any paper or record which was before the lower court, even though it has not been included in a bill of exceptions.

A certificate by the judge or clerk that a paper was used at the trial or hearing by the lower court cannot take the place of a bill of exceptions and is insufficient to authorize the consideration of such paper on appeal. (2 Cal. Jur. 605, 607; *Melde v.*

Reynolds, 120 Cal. 237; Ramsbottom v. Fitzgerald, 128 Cal. 75; Totten v. Barlow, 165 Cal. 378; Waymire v. California Trona Co., 176 Cal. 395.)

Neither can an affidavit presented to the appellate court be used to supply matter which should have been included in a bill of exceptions. (In re O'Connor, 128 Cal. 279; Balan v. National, etc. Bank, 19 Cal. App. 778.) In making up a bill of exceptions the appellant is entitled to include therein only the evidence which was heard by the trial court, or evidence which was offered and excluded. The bill is not intended as a means for introducing newly discovered evidence or any other matters which were not presented to the court at the trial. (2 Cal. Jur. 535; In re Moore, 78 Cal. 242.)

In San Diego Savings Bank v. Goodsell, 137 Cal. 420, the Supreme Court held that a bill of exceptions is insufficient which merely refers to various documents, stating their character, date of filing, and the name of the affiant (in case of affidavits), even if papers corresponding to this description appear in the record. This decision appears to be inconsistent with the provision of section 648 that "documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto sufficient to identify them may be made." This provision was in effect long before that decision was made, but apparently it was not called to the attention of the court in that case. Moreover the decision is based on Rule XXIX of the Supreme Court, which requires such papers to be "incorporated" in a bill of exceptions. There is no such provision in the law relating to municipal court appeals, and hence this decision is probably not applicable thereto. However, any paper not incorporated in the bill of exceptions will not be forwarded to the superior court under section 988c, and it will be necessary for the appellant to resort to section 988b to bring such paper before the superior court, so nothing will be gained by inserting a mere reference in the bill of exceptions.

Another rule was stated as follows in Cohen v. Wallace, 107 Cal. 133, 139, after a review of various prior decisions:

"From these cases it may be fairly taken as established that in instances where the proposed bill is either merely a copy of the reporter's transcript, without any effort to reduce to proper form

for the purpose of presenting the questions involved, or where it is a mere skeleton, so bald of the essential requisites of the bill contemplated by the statute that it cannot in any true sense be regarded as such, it may be disregarded."

This rule is supported by several cases decided before Cohen v. Wallace. (People v. Getty, 49 Cal. 581; People v. Sprague, 53 Cal. 422; January v. Superior Court, 73 Cal. 537; Sansome v. Myers, 77 Cal. 353, 80 Cal. 483.)

However, in Cohen v. Wallace, the court said this doctrine was a harsh and rigid one and should not be extended to cases not falling strictly within the class to which it had been previously applied, and that even in such cases it would be better that the judge, instead of refusing to settle the bill, should require the party presenting the objectionable bill to put it in proper shape, giving a reasonable time for such purpose; saying also that for this purpose it is not necessary that the labor of making a proper bill of exceptions should be assumed by the judge. In Winters v. Buck, 121 Cal. 279, Cohen v. Wallace was followed on the rule last stated, and the defendant judge was ordered to settle a bill of exceptions, although as presented it was only a transcript of the notes of the official stenographer. The court did not hold, however, that the judge should sign the bill as proposed, but merely that he should require the party presenting it to recast it in proper form and then sign it.

To cover the possibility of unfair action in the settlement of bills of exceptions, section 988a contains a provision, borrowed from the procedure on appeals from the superior courts, that if a judge refuses to allow a bill of exceptions in accordance with the facts the party desiring the bill settled may apply by petition to the superior court to prove the same and have a settlement made by that court. It has been held that this provision does not apply to cases where the judge refuses to settle a bill of exceptions by reason of some defect in the bill whereby it does not comply with the law, such as the presentation of a mere skeleton or reporter's transcript, or by reason of failure to serve the bill on the adverse party or other matter justifying a refusal to settle the bill at all. The remedy in such cases if the trial judge acts erroneously in refusing to settle the bill is a pro-

ceeding in mandamus against him (2 Cal. Jur. 578-9). The provision in question refers only to cases where the judge has refused to certify that an exception was taken or that the ruling or decision expected to was made. It does not cover cases where the party presenting the bill disagrees with the trial judge as to what evidence was introduced (2 Cal. Jur. 578-580).

When a bill of exceptions is finally settled section 650 requires that it be engrossed before it is certified by the trial judge. This means that all the amendments which have been allowed must be embodied in it; and if necessary to accomplish this result and present a legible and intelligible document, it must be rewritten, in whole or in part, so as to present the final engrossed and certified bill of exceptions in the form of a single document in which shall be contained all matters which, upon the settlement, the judge has ordered to be inserted in the bill. The burden of so engrossing the bill rests on the appealing party, for it is his duty to make and present the record on appeal. I mention these matters in detail because under the former law, which contained no express provision for engrossing a statement of the case—although it seems to me that such provision could fairly be implied from the uniform practice of the statute in referring to "a statement" or "the statement" in the singular number—statements were frequently presented to me which consisted of the appellant's proposed statement and the respondent's proposed amendments, both certified by the trial judge. In some cases each of these documents had been further altered in the settlement, and in other cases they flatly contradicted each other; and in many cases the examination of the record on appeal was

considerably hindered and made more difficult by the necessity of frequent cross references from one document to the other to ascertain what was the statement approved by the trial judge. The law regarding bills of exceptions clearly does not contemplate the imposition of any such burden on an appellate tribunal.

The question will no doubt arise in cases where judgments were rendered or appeals taken before July 29, 1927, whether the record on appeal is to be made by a statement of the case under the old law or by a bill of exceptions under the amendments, and also whether the time within which to initiate proceedings for such record expires ten days after notice of rendition of judgment under the old law, or is to be computed according to section 650 adopted by the new law for this purpose, which extends the time under some circumstances to ten days after notice of the decision denying a motion for a new trial, if such a motion is pending. These questions are closely connected, if indeed they are not in effect the same, for if the old law as to the method of preparing the record is held to be applicable in any case, undoubtedly the provisions of the same law as to the time therefor must also be adopted. I can see no possible ground for holding that the time fixed in section 650 for preparing a bill of exceptions can be applied to a statement of the case under section 975, or vice versa.

A case presenting a very similar question was before the supreme court in *Schmitt v. White*, 172 Cal. 554, which involved the series of code amendments made in 1915 cutting off the right of appeal from orders on motion for a new trial, authorizing the appellate courts to review those orders on appeal from the judgment and extending the time for the preparation of a record on appeal from the judgment until after decision on the motion for a new trial. In that case the provisions of section 953a were under consideration, which before the amendment required proceedings for a record to be commenced within ten days after notice of entry of judgment, but after the amendment extended the time until ten days after notice of decision denying the motion or a new trial. The appellant had given notice of intention to move for a new trial before the amendments took effect, but had allowed the time then fixed

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EXPERT TESTIMONY

(Continued on Page 27)

Program for Meeting of State Bar Association at Coronado

SILAS H. STRAWN, of Chicago Will Deliver Annual Address.

Important Business to be Transacted. Expected to Bring Out Record Attendance.

The meeting of the California Bar Association, which will be held this year at Coronado on September 15, 16, 17, promises to be the most important in the history of the association, as a number of far-reaching problems regarding the future of the association will be taken up. A record attendance is expected.

The program for the meeting as announced by Secretary Robinson will be as follows:

The meeting will open on Thursday morning, September 15 at 9 o'clock with the meeting of the Executive Committee. At 10 o'clock the general meeting will be opened by President Thomas C. Ridgway and the address of welcome will be delivered by Mayor Harry C. Clark of San Diego. Frank G. Tyrrell of Los Angeles will respond for the attorneys.

Reports of the Secretary, Treasurer, Executive Committee and the Legislative Committee, of which Alfred Bartlett of Los Angeles is chairman, will then be given. The nominating committee will also be elected at this time.

Carl I. Wheat, attorney for the Railroad Commission will then deliver an address on "Some Pitfalls of the Practice before the Railroad Commission of the State of California." The report of the special committee to co-operate with the Corporation Commissioner, James S. Bennett chairman, will give their report.

Mark Slosson will deliver an address on "Practice and Procedure in the Corporation Commissioner's office."

On Thursday afternoon the annual address of the president will be delivered by Thomas C. Ridgway who has taken for

his subject "Carrying the Torch." Perry Evans and William Denman will take the affirmative in a debate on the Commonwealth Club's plan on appointment of judiciary with subsequent ratification by the voters and Charles S. Craig and Kemper Campbell will speak in opposition to the proposed plan.

At this session reports will be given by the chairmen of Section "A"—Constitutional Amendments; Section "G"—Courts and Judicial Officers; Section "B"—Criminal Law and Procedure, Section "D"—Amendments to Substantive Law. Hon. F. M. Angelotti will also give the report of the special committee of Judicial Selection. The meeting Thursday afternoon will be presided over by Vice-President Leonard Slosson.

On Thursday evening, the session will commence at 7:30 and will be presided over by Vice-President Lewis R. Smith. Judge Waldo M. York will deliver an address on "Some Lawyers I Have Known." Chief Justice William H. Waste will give the report on status and program of the State Bar of California, and the report of the special committee of Future Activities of the California Bar Association will be given by Chairman Eugene Daney.

Joseph J. Webb will present the report of the committee on the Organization of the Bar.

Friday morning the reports of the sections on Civil Procedure, Pleading and Practice, Trusts and Corporations, Legal Ethics, Uniformity of State Laws, Legal Education and Restatement and Classification of the Law will be presented to the association.

The annual address of the association will be delivered at 11 o'clock Friday morning by Silas H. Strawn of Chicago, an attorney of international repute who was the representative of the United States in the commission appointed by the world powers to make a report on the Chinese

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courts. Mr. Strawn will speak on "Our Changing Responsibilities."

In the afternoon the Judicial Section will hold its meeting. Addresses scheduled are, "Revision and Jurisdiction of Courts of Record as Proposed by Senate Constitutional Amendment No. 12," by Presiding Justice William Finch of the District Court of Appellate District, "Amelioration and Acceleration of the Work of the Upper Courts," by Judge Clair S. Tappaan of the Los Angeles Superior Court; "Expedition of Trial Court Work," by Judge S. L. Strother of the Fresno Superior Court; and "The Judicial Council in Operation," by Judge Harry A. Hollzer of Los Angeles, secretary of the Judicial Council.

Members of the Bar Association will be guests also on Friday afternoon at a tea and reception in the late John W. Mitchell's Gallery of Fine Arts.

In the evening the Greek Tragedy "Eumenides" will be presented in the Greek Theater of the International Theosophical Headquarters at Point Loma, under the direction of Madame Katherine Tingley, for the entertainment of the visitors.

Saturday morning reports of the Judicial Section and Special Committee on Indigent Lawyers will be presented, and the standing committees will make their reports. Miscellaneous business and amendments to the By-Laws will also be taken up at this time.

The report of the nominating committee and the election of officers will close the morning session.

Saturday afternoon will be given over to numerous entertainments. The lawyers of Lower California have arranged a reception for the association members at Tia Juana, which invitation was extended by Abelardo Rodriquez, Governor of Lower California. Automobile rides, golf and other entertainment will also be provided.

A dazzling array of speakers will be guests at the Eighteenth annual banquet of the State Bar Association at Hotel Del Coronado, on Saturday evening, September 17, at 7:00 p.m. The list of speakers will be made public later, Secretary Robinson announced.

Headquarters of the convention will be maintained at Hotel Del Coronado during the convention.

The President's Page

Fellow Members

Los Angeles Bar Association:

MEETING OF CALIFORNIA BAR ASSOCIATION AT CORONADO, SEPTEMBER 15-17

This meeting will be a most instructive and notable occasion. A forecast of the meeting is printed elsewhere in this issue. It is very encouraging to note the widespread interest in the Bar Association movement. This revival of spirit is due to the fact that the attorneys throughout the country have thoroughly awakened to a realization of the shortcomings of our judicial system and are intent upon far-reaching reforms. The conduct of business has outstripped archaic methods of administration of justice and left them a century behind. Up-to-date business men are thoroughly dissatisfied with the antiquated methods of determining financial disputes and demand changes. The result is paradoxical. The more efficient, prosperous and otherwise "conservative" the lawyers clientele, the more ardent for reform seems to be the lawyer who represents them—a reflection of the attitude of his clients. This is a very healthy state of affairs and it results in most spirited, constructive and interesting conventions of the bar.

Do not fail to attend the meetings to be held at Coronado on September 15, 16 and 17.

CREDIT TO WHOM CREDIT IS DUE

Despite my unquenchable optimism in Bar Association matters, I am continually surprised and more than gratified by the spirit of service in our membership. We have literally hundreds of members who, apparently without thought of appreciation or other reward, hasten to offer aid when any work has to be done, however irksome such duty may be. If space permitted, I would like to include in my page the names of 327 members of the Association who volunteered to assist in the canvass con-

ducted to make a complete roster of the names, addresses and telephone numbers of all members of the bar in Los Angeles County. I know of no organization that has ever accomplished a similar task so completely and promptly. There are some 296 buildings in Los Angeles listed as office buildings, and there are about 50 towns outside of Los Angeles in which attorneys have offices. In the City of Los Angeles we assigned to each volunteer a certain designated building, or portion thereof, and the same plan was followed also in Pasadena and Long Beach. Other towns were assigned to individual committeemen. Roster blanks were sent out and each committeeman instructed to call at every office in his building, whether it appeared to be a law office or not, to make inquiry as to attorneys, if any, located therein, noting name, office number and telephone. In addition to this, we sent out form letters to about one thousand corporations (those deemed most likely to have in their employ members of the bar not in general practice). We took also the classified telephone directory of attorneys and the city classified directory. We had also the mailing list of the San Francisco Recorder.

The names secured by the canvass were typed upon cards, sorted alphabetically and duplicates eliminated. Practically all of the work of canvassing done by our volunteers was completed within the astonishingly brief period of ten days. *Only one man out of the 327 volunteers fell down on the job, and he had a very good excuse by reason of matters beyond his control.*

The astounding result of the final tabulation shows that we have in Los Angeles County, entitled to practice law, 4608 lawyers.

I want to express to every one of the volunteers who assisted in this tedious and unattractive work of canvassing from office to office my appreciation and gratitude for their very fine self-sacrificing service. I think that I can challenge any organization anywhere to equal the above record. It evidences a wonderful spirit in Los Angeles Bar Association of which we may all be justly proud.

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Specific Denials in Pleadings to Create Issue of Fact When Known to be Untrue

By KENNETH KEEPER of the Los Angeles Bar.

Lately, there has come to the attention of the members of the Los Angeles Bar for consideration, the growing habit of attorneys permitting their clients to verify pleadings containing denial of facts, the truth of which is well and clearly known to the person denying them. More often than not this practice arises solely out of the desire on the part of attorney and client to obstruct and hinder the progress of a litigating opponent.

Considered in the light of ethical conduct, there are many things that defer not to the interest or convenience of a client. Among these, there stands clearly and unmistakably the positive duty of an attorney to prevent his or her client from verifying a denial of facts, the truth of which is known to such person to exist. It may seem extravagant to make the statement that such practice is being used more today than in past years, and yet a study of the different pleadings which are being filed today discloses that the practice is increasing. It is difficult to answer the query as herein set forth, in such a manner that the answer may be available for use under all circumstances or occasions, but it is believed that the practice involved is one which concerns a phase of legal ethics which should be of interest to every practicing attorney today, and any answer made to the query must be based upon two grounds: First, upon what is permitted by the authorities on pleading, and second, what the ethics of the profession will permit.

Investigation discloses that in instances of denials of pleadings of this nature, the attorneys involved are not young or inexperienced, or those not familiar with procedure, as one might expect, but they are found to be attorneys who have been practicing a large number of years and who are respected and well thought of before the Bar. They have indulged in this habit feeling that they were doing so properly, and probably within the principles of pleading and the ethics of the profession. Some have even made the statement that a practice of this kind is not only countenanced

but authorized in the majority of the eastern jurisdictions; but research fails to support such statement, at least to the extent of recognized approval.

One of the commonest forms of pleading in which this principle is involved is that of a complaint on a promissory note, to which an answer is filed by the defendant denying the execution of the note, when as a matter of fact, if the truth were pleaded, it would be admitted that the defendant did execute the note. In such a case the attorney no doubt, at the time the answer was prepared, knew that the defendant had executed the note, and probably knew all the circumstances surrounding the transaction, but merely to prolong the litigation or prevent a judgment being taken on the pleadings, the attorney prepared such a form of pleading and countenanced it being verified by his client. The rule of pleading involved in a matter of this kind is so elementary that even the youngest law student knows that such a form of allegation cannot be made under the accepted rules of pleading and practice of the state of California, and yet we find that the same or similar forms of pleading are being used by attorneys every day. The writer hesitates to say that it is done upon the theory that the attorneys are knowingly indulging in sharp practice, but would rather say that the attorney feels that he is protecting his client's interest to the furthestmost extent, and also that he feels that such practice is countenanced not only by his fellow members of the profession, but by the principles of pleading as well.

Taking up first the principles of pleading involved, we find that Section 437 of the Code of Civil Procedure provides that where the complaint is verified, a denial of each allegation controverted must be specific and be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial upon that ground. This

section of the Code has been strictly construed and followed and there are many authorities upon the subject of its construction, but only the leading ones as will clearly set forth the ideas which the writer desires to convey herein, will be cited and set forth.

Probably the leading case where the principle is discussed is that of *Zany v. Rawhide Gold Mining Co.* 15 Cal. App. 373, in which it was stated:

"It is to be observed that not a single allegation of the complaint is denied positively. As is stated in *Loveland v. Garner*, 74 Cal. 301, (15 Pac. 844), the rule is well settled that 'where the facts alleged in the complaint are presumptively within the knowledge of the defendant he must answer positively and a denial upon information and belief will be treated as an evasion'. (*Curtis v. Richards*, 9 Cal. 38.) And in such a case, the defendant should, at least, show how it happened that he was without knowledge as to such facts. (*Brown v. Scott*, 25 Cal. 190.) And the rule applies as well to corporations as to natural individuals. * * *

"The rules of pleading, under our system, are intended to prevent evasion and to require a denial of every specific averment in a sworn complaint, in substance and in spirit, and whenever the defendant fails to make such denial, he admits the averment. (*Doll v. Good*, 38 Cal. 290.) * * *

"In *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, (105 Pac. 130), it is held that a denial of the averment of non-payment of a note for want of information and belief is evasive and raises no issue, 'being of matter presumptively within the knowledge of the defendant, which must be positively denied.'"

In *Zenos v. Britten-Cook Land & Livestock Co.* 48 Cal. App. 623, the court said:

"On this appeal the appellant urges that the judgment must be reversed because the evidence fails to support the finding of due execution of the mortgage and because the trial court, not having specifically found on the issues of ratification or estoppel, the respondent cannot avail himself of that answer to the appellant's defense of want of authority to execute the mortgage. The issue of due execution of the mortgage was not properly brought before the trial court. The complaint is in the usual form of a suit

to foreclose a mortgage. The execution of the promissory note and of the mortgage to secure its payment was specifically pleaded. The answer did not directly deny any of the material allegations of the complaint. The defendant denied on information and belief only that the corporation executed either the note or the mortgage and denied on information and belief also that the corporation had authorized the execution of either the note or the mortgage by resolution of its board of directors or otherwise or that the corporation had ratified the execution or delivery thereof. These denials were followed by the pleading that the defendant corporation was informed and believed and upon such information and belief alleged that no interest had been paid by the defendant corporation upon the alleged indebtedness. The answer is plainly sham and frivolous. All the facts alleged in the complaint and which were denied for lack of information and belief were facts which were presumably within the knowledge of the corporation and required a positive denial in the answer. These books and files of the corporation were all available to the pleader and it had every opportunity to ascertain the truth of the facts alleged in the complaint prior to the filing of the answer, or at least in time to enable it to file an amended answer before the trial of the cause which was held more than one year after the original answer was filed. (1) When the facts alleged in a verified complaint are presumptively within the knowledge of the defendant he must answer positively and an answer upon information and belief only should be treated as an evasion and an admission of the facts alleged in the complaint. (*Curtis v. Richards & Vantine*, 9 Cal. 33, 38; *The San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 452, 466; *Loveland v. Garner*, 74 Cal. 298, 300; *Zany v. The Rawhide Gold Mining Co.*, 15 Cal. App. 373, 376.) In view of the rule of the cases cited the answer should have been treated as sham and evasive and the respondent was entitled to judgment upon the completion of a prima facie case."

In a recent case bearing upon the point under discussion, that of *Aronson & Co. v. Pearson*, 199 Cal. 295, at p. 298, it was said:

"For sixty-eight years the form of denial adopted by the defendant has been

held insufficient. Relative to the denial of the allegations of a verified complaint, section 437 of the Code of Civil Procedure provides: 'If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground'. Section 46 of the Practice Act, as amended in 1854, permitted a defendant to deny an allegation of a verified complaint 'according to his information and belief'. In *Curtis v. Richards & Valentine*, 9 Cal. 34, 38, the defendants based their denial upon the averment that 'they have not sufficient knowledge or information to form a belief'. The court said: 'By the forty-sixth section of the Practice Act, as originally passed in 1851, it was provided that an allegation of the complaint might be controverted by a denial 'of any knowledge thereof sufficient to form a belief'. In practice, this mode of denial was found to furnish a convenient pretext for evading the statute. In some instances, defendants became critical in their judgments, as to the extent of knowledge sufficient to form a belief, and would, without hesitation, deny, in that form, facts upon the existence of which they did not hesitate to act in other matters. In 1854, the forty-sixth section was amended to the present language, and the wisdom of the amendment is well illustrated by the present case'. The same construction has been placed upon the foregoing provision of section 437 of the Code of Civil Procedure. (*Naftzger v. Gregg*, 99 Cal. 83, 87, (37 Am. St. Rep. 23, 33 Pac. 757); *Turner v. Watkins*, 36 Cal. App. 503, 504, (172 Pac. 620); *Nave v. Graham*, 37 Cal. App. 332, 334 (174 Pac. 76).")

Having seen, therefore, that the authorities pertaining to this phase of pleading do not countenance or permit the denial of an allegation when the facts are within the knowledge of the defendant, or when he knows the allegation to be true, the question then arises as to what point of legal ethics is involved in a matter of this kind. Immediately one sees that the element of truth is at issue. It is said that truth is the foundation of every virtue, and in the practice of law, its due observance is absolutely essential to that kind of success which should constitute the lawyer's highest am-

bition. But modern society has produced many conventions, and the practice of law is not without them. Some in this day even go so far as to say that these conventions may be permitted to supersede the general rule of truth. In support of this, it is contended that the profession exists as an instrument in the administration of justice; that it is a necessary maxim of the profession that an attorney is to do all that can be done for his client; that the application of the laws is a matter of great complexity and difficulty, and that their application in doubtful cases is best provided for if the arguments on each side be urged with the utmost force, leaving the judge alone to decide; and that for this purpose, attorneys must urge all the arguments that they can devise, and with all the skill that they can command; and that this duty is not affected by any belief of their own which they might have upon the subject. This does not in all respects, however, represent the thought of the better element of the Bar, neither does it coincide with the practice of those who see in the conduct of lawsuits something more than mere forensic battles waged by paid champions ready to espouse either side of an argument.

It is generally admitted that to answer the ends of justice in a community, there should exist a profession of attorneys ready to urge with full force the argument on each side in doubtful cases; and if the attorney, in exercising his profession, allows it to be understood that this is all he undertakes to do, then it is further conceded he does not transgress his duties even in pleading for a bad cause, since even for a bad cause there may be arguments, and even good arguments. But if in the conduct of the cause he asserts his belief that it is just, when he believes it to be unjust, and if he advances as true that which he knows to be untrue, he offends against truth just as any other man would do who in like manner made the same assertions. Attorneys must therefore look upon their profession like every other endowment and possession, as an instrument which they must use for the purpose of the advancement of justice. To act uprightly is their proper observance, and to succeed as lawyers is proper observance only so far as it is consistent with the former. Making all due allowances for the many peculiar

(Continued on Page 26)

Doings of the Committees

COMMITTEE ON LEGAL ETHICS—

The Committee on Legal Ethics recently adopted the following opinion, prepared by Mr. John O'Melveny:

"The question has been submitted to the Committee on Legal Ethics of the Los Angeles Bar Association as to whether or not it is permissible for attorneys to allow their clients to verify pleadings containing a denial of facts the truth of which is well known to the person denying them. The Committee is of the opinion that such practice is not only contrary to recognized rules of pleading but is unethical. Such practice gives an opportunity for delaying and hindering the progress of litigation and is expressly prohibited by the laws of this state."

As stated in the issue of the BULLETIN of July 21, 1927, the Committee deems the subject-matter of this opinion of real importance to members of the profession by reason of the fact that quite a few attorneys believe that the practice condemned in the opinion is thoroughly justifiable. Accordingly, the Committee requested Mr. Kenneth Keeper to prepare a paper to elaborate on its opinion. That paper appears on page 17 of this issue.

COMMITTEE ON CRIMINAL LAW AND PROCEDURE

The last regular meeting of the Committee on Criminal Law and Procedure was held the evening of August 9 in the Grand Jury Room at the Hall of Justice. In the absence of the chairman, Mr. Walter Little, the vice-chairman, Mr. Jerry Geisler, presided. Present: Judges Willis and Fricke, Messrs. Geisler, Hammon, Dunham, Randall, Shapiro, Phillips, Haines, Rosenfield, Sokolow, Miss Halloran and Miss Kellogg of the Committee; also Mr. Purdue, Associate Editor of the *Bulletin*.

Reports were received from the following members as chairmen of sub-committees: Mr. Phillips, chairman of the crime prevention plan committee; Miss Halloran chairman of the committee to amend the laws with reference to the admission of evidence relating to insanity; Mr. Randall, chairman of the special committee appointed to investigate the alleged incarceration

and unlawful detention by the police of a druggist and his assistant.

The question raised by a motion of Miss Peggy Halloran that the committee recommend to the Bar Association that a questionnaire be sent to all members, asking them in what branches of law they specialize or generally practice and whether or not they would take criminal practice, was referred to a committee to work out in detail as to the further advisability of such a questionnaire, the matter of its preparation, and the use of information gained.

An extremely interesting general discussion and exchange of ideas were had on subjects relevant to the purposes of the committee. Mr. Rosenfield gave an instructive talk on the question of handling criminals and practicable methods of lessening crime, stressing the duty of lawyers to take the lead in reform work. Judge Fricke gave enlightening views of what should be the position and decorum of attorneys in the conduct of criminal cases, and the duty and responsibility of the judiciary in the trial of these cases. Miss Kellogg stated that she believed one of the reasons why many reputable attorneys avoided criminal practice was because of the faulty procedure and methods of handling persons convicted of crime, pointing out that our present methods often fail to accomplish justice, and that most persons, and lawyers in particular like to feel that their work is constructive, and the general result a betterment to society. Judge Willis in a discussion emphasized the need of elevating the personnel of the bar conducting criminal cases, giving reasons why the standard at present is not what it should be, and presenting constructive ideas for improvement. Further interesting suggestions along lines of improvement were made by Messrs. Phillips and Haynes. It is anticipated that the views advanced will be materialized in the form of concrete reports and recommendations.

Respectfully submitted,

CAROLINE KELLOGG,
Secretary

SECTION ON CIVIL PROCEDURE

This Section has had several meetings. After considerable discussion it was decid-

ed to take up the matter of reforms in Civil Procedure by recommending amendments to the present Code of Civil Procedure rather than by the repeal of the present Code and the adoption of a short Practice Act and leaving all other matters to be regulated by rules of the Court.

It was then decided that the chairman, George E. Waldo, be authorized to appoint such sub-committees as he deemed proper and to divide the Code of Civil Procedure in parts among these committees for study and report to and consideration by the Section as a whole, and thereafter the preparation of a general report for submission to the Bar Association.

The Section wishes to have all the suggestions possible from the members of the bar generally, such suggestions to be submitted in writing to George E. Waldo, the chairman, Boston Building, Pasadena, or to Mr. Spencer Ward, the assistant secretary, H. W. Hellman Building, Los Angeles, or to any member of the sub-committees.

The list of officers and sub-committees is as follows:

Chairman: George E. Waldo—Terrace 5151.

Boston Building, Pasadena.

Vice - Chairman: Lewis Cruickshank—Tucker 3323.

Nat'l. City Bank Bldg., Los Angeles.

Secretary: A. H. Swallow—Trinity 0261. 510 So. Spring St., Los Angeles.

Ass't. Secretary: Spencer Ward—Granite 5007.

H. W. Hellman Building, Los Angeles.

LIST OF SUB-COMMITTEES

COMMITTEE No. I

on Part I of the Code of Civil Procedure
PRELIMINARY PROVISIONS

Title I.—Courts of Justice (Sec. 1-153)

Title II.—Judicial Officers (Sec. 156-188)

Title III.—Persons with Powers of Judicial Nature (Sec. 190-259)

Title IV.—Ministerial Officers (Sec. 262-274b)

Edward Winterer, *Chairman*

E. Earl Crandell

Joseph R. Marquette, Jr.

COMMITTEE No. II

on Part II of the Code of Civil Procedure

Title I.—Form of Civil Actions (Sec. 307-309)

Title II.—Time of Commencing Actions (Sec. 312-363)

Title III.—Parties to Civil Actions (Sec. 367-390)

Title IV.—Place of Trial of Civil Actions (Sec. 392-400)

Title V.—Manner of Commencing Civil Actions (Sec. 405-416)

Title VI.—Pleadings in Civil Actions (Sec. 420-476)

Title VII.—Provisional Remedies in Civil Actions (Sec. 478-574)

Charles W. Cradick, *Chairman*

Will Hays

Leon R. Yankwich

C. A. Ballreich

W. Turney Fox

John H. Waldo

COMMITTEE No. III

Title VIII.—Trial and Judgment in Civil Actions (Sec. 577-680½)

Title IX.—Execution of Judgment in Civil Actions (Sec. 681-721)

Lewis Cruickshank, *Chairman*

Victor P. Showers

Kimpton Ellis

Raphael Dechter

Nelson McDonald

Melvin Wilson

COMMITTEE No. IV

Title X.—Actions in Particular Cases (Sec. 726-827)

Emmett H. Wilson, *Chairman*

Jerome H. Kann

J. W. Vickers

W. C. Mathis

COMMITTEE No. V

MUNICIPAL COURTS

Title XI.—Proceedings in Justice's Courts. (Sec. 832-926)

Title XII.—Proceedings in Civil Actions in Police Courts (Sec. 929-933)

R. Morgan Galbreth, *Chairman*

Samuel Rosenthal

James R. Jaffray

Harold Ide Cruzan

COMMITTEE No. VI

Title XIII.—Appeals in Civil Actions. (Sec. 936-981)

(Continued on Page 26)

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Case Notes*

WILLIAM E. BURBY of the Los Angeles Bar
Professor of Law, University of Southern California

STATUTORY INTERPRETATION— CONSTRUCTION AND INTER- PRETATION OF FOREIGN STAT- UTES.

The argument was presented in *Hawai Mill & Plantation Co. v. Finn*, 52 C.A.D. 967, (April 9, 1927) that the construction and interpretation to be placed upon a certain Mexican statute was a question of law for the court. *Held*, that the construction and interpretation of foreign statutes (which would of course include the statutory provisions in other states) is a question of fact for the jury.

It is well settled that foreign laws must be proved as facts. The construction given a statute of another jurisdiction becomes a part of the law there and, as such, becomes a question of fact for the jury. It is to be noted that there is at least one limitation to the rule that the construction and interpretation of a foreign law is a question of fact for the jury. "But when the existence and terms of a foreign law have been proved as facts, and there is no evidence as to the construction put upon (the statute) at home, or when for any reason that construction is not to be followed, then there is presented a question with which the jury is not concerned, but it belongs exclusively to the court." Black On the Interpretation of Laws, pg. 16. Unless a construction has been placed upon the statute at home, there is no construction which has become a part of the law and for that reason the jury would not be concerned with the construction or interpretation of the statute in question.

ADVERSE POSSESSION—PAYMENT OF TAXES.

Mrs. Butler owned an 80 foot lot in the city of Sacramento. In 1885 she sold the west 44 feet of said lot to the defendant's grantor. Mrs. Butler continued to occupy a portion of the land sold. In 1892 Mrs. Butler conveyed the easterly portion of the lot to plaintiff's grantor, the deed pur-

porting to convey 38 feet. As a matter of fact she was the owner of only 36 feet. From 1892 till 1909 plaintiff's grantor paid the taxes levied on the 38 feet described in the deed from Mrs. Butler. During that time, however, defendant's grantor paid the taxes levied on the westerly 44 feet. Plaintiff now claims that title to the two foot strip was acquired by adverse possession. *Held*, for plaintiff. *Harvey v. Berry*, 73 C.D. 519, (April 19, 1927).

The court reached the conclusion in the instant case that the question of holding over by a grantor as provided for in sec. 32 of the Code of Civil Procedure did not apply as against the grantor's successors in title. It is interesting to note that in the instant case the paper title owner paid the taxes levied on the property during the time that it was held adversely. It follows from the decision, that if the adverse holder pays the taxes levied against the property for the statutory period he will acquire a good and perfect title to the property even though during that time the paper title owner also pays the taxes on the property held adversely. The owner of real property can not avoid the results of the statute of limitations, if his land is occupied adversely, merely by paying the taxes levied against him on the property, for it may be, as was the situation in the instant case, that the adverse possessor is also taxed for the same property and his title will be protected if he pays the same.

CORRECTION NOTED

In the last issue of the BULLETIN, that of August 4, a printer's error was made in the first sentence of the Case Note on Citizenship submitted by Dr. R. L. Olson. The sentence should read as follows:

"Query: When may a father who has been a citizen of the United States from birth, have a family of his own children some of whom are aliens and others of whom are citizens?"

*EDITOR'S NOTE: The BULLETIN will be pleased to accept for publication reviews of, and comments on, recent decisions, and members of the bar are urged to co-operate with Mr. Burby in effectuating the maintaining of *Case Notes* as a noteworthy feature of the BULLETIN. Reviews should be mailed to the office of Mr. Burby, 3660 University Avenue.

Book Reviews

By HARRY GRAHAM BALTER of the Los Angeles Bar

CORPORATION SECRETARY'S GUIDE; William H. Crow, A.B., L.L.B.; 1926; XX and 764 pages; Prentice-Hall, Inc., New York. CORPORATION TREASURER'S AND CONTROLLER'S GUIDE; William H. Crow, A.B., L.L.B.; 1927; XLI and 1657 pages; Prentice-Hall, Inc., New York.

The reviewer trusts that he will be forgiven if his treatment of these companion volumes is rather matter of fact and lacking in statement of personal opinion or reaction.

Both volumes are as their names indicate, intended for the use of the particular corporate officers. Because of that fact they are not text books or commentaries, but highly practical manuals.

The *Corporation Secretary's Guide*, the first of these two books to be published, was prepared principally because of a long-felt need for a practical reference book which would deal with the systematic collection and marshalling of precedents of American secretarial practice. Although a mass of substantive law pertaining to the corporation and the secretarial office is found in our law books, we, unlike the English, have little, if any, literature devoted to secretarial practice. The seemingly boundless wealth of material contained in this book is the result of material contributed by the secretaries of hundreds of the leading corporations of this country, large, average and small. In fact, this material is the most valuable part of the work. Acknowledgement is made by the author to 146 corporation secretaries.

The only practical method of conveying to the reader a notion of the scope of the book is to list the subjects discussed and treated. They follow:

The Nature and Scope of the Secretary's Office.

Qualifications and Training of the English Secretary.

Qualifications and Training of American Corporation Secretary.

The Secretary's Concern with Pre-Organization Matters.

Incorporation and Organization.

Management and Control of the Corporation.

Oath, Seal, Reports, and Notices.

Stockholders' Lists, Meetings, and Proxies.

Duties Preliminary to Meetings.

Directors' Meetings—Minutes and Notifications.

Legality of Corporate Meetings and Elections.

Books and Records.

Stock Transfer Books and Systems and Their Supervisions.

Transfer Requirements.

Transfer Requirements of Inheritance Tax Laws.

Case Law—State Stock Transfer Tax Laws and Federal Statutory Provisions Affecting Transfers.

Systems of Handling Transfers.

Corporate Taxation and the Secretary's Responsibility in Tax Matters.

Secretary's Miscellaneous Duties.

Secretary's Duties in Respect to Security Offerings.

Legal and Practical Aspects of Privileged Offerings.

Current Methods and Procedures in Right Issues.

Commercial Law.

Glossary of Stock Exchange and Financial Terms.

Appendix

Charters and Certificates of Incorporation For Some of the Principal Incorporating States.

Forms of By-Laws.

Forms of Notices, Proxies, Waivers, etc.

Minutes of First Meetings of Incorporators, Annual Meetings of Stockholders, Regular and Special Meeting of Directors, Meeting of Executive Committee, etc.

Forms Relating to Stock and Miscellaneous Matters.

Application for Listing; Listing Requirements of Philadelphia, Boston, London and Paris Stock Exchanges; Rules of Delivery; Fees for Listings, etc.

Constitution and By-Laws of Mutual Benefit Association Conducted by Employees Covering Workmen's Compensation.

Tables

Principal Forms of Business Associations.

Important Requirements of Incorporations in the Various States.

Organization and Annual Franchise Taxes Imposed in the Various States.

Foreign Corporations Requirements—
Fees and Penalties.

Additional Qualification Provisions for
Foreign Corporations.

Taxability of Corporate Bonds and
Stocks.

For Computing Federal Estate Tax.

Blue Sky Laws in the Various States.

Schedule of Commissions under Rules
of Chicago Stock Exchange.

Index.

It should be noted that the treatment is
in great detail. Theory is almost wholly
absent, but the minute exposition of practical
matters distinguishes the work. Note,
for example, as illustrative, the following
few sentences:

"The secretary of one of the large corporations, who has pursued the method of
typing the minutes directly into a bound
book, because of the practical difficulty in
writing close to the center margins, has
reversed the plan of having the margins
on the outer side of the sheets and arranged
for margins to be ruled with wider spaces
left at the bound sides of the sheets. Thus
title of resolutions, and so forth, can be
written in these margins instead of being
written in the outer margins as usual. An
interesting plan for arranging the minutes
is that inaugurated by the secretary of a
great steel company. The minutes occupy
about two-thirds of the page on the inner
side. In the outer margin, occupying the
remaining third of the page, separated by
a specially ruled line, are synopses of the
subject matter contained in the discussions,
resolutions, and reports. The ample marginal
space permits fuller summaries than the
usual brief headings." (Pages 247-
248.)

The *Corporation Treasurer's and Controller's Guide* is the result of suggestions
made by financial and accounting executives,
incumbents of combined offices, who
as Secretaries all contributed information
to the *Corporation Secretary's Guide*. The
plan of this work is similar to that of the
Corporation Secretary's Guide. The work
is a technical one and naturally, the knowledge
on the part of the reader of the fundamental
principles of accounting, business administration,
and operating and financial management,
is assumed. A survey of the contents is
convincing proof that the work is not
intended for the layman:

History, Nature and Scope of Offices.

Organization.

Classification of Duties.

Beginning and End of Official Tenure.

Cash Receipts and Disbursements.

Financial Supervision and Control.

Relations With Banks and Other Lenders.

The Financial Statement.

Capital Financing.

Supervision of Stock Offering Activities.

Detailed Procedure of Stock Issuance.

Duties Connected with Bond Issues.

Bond Interest and Coupon Payment

Procedure.

Dividend Payments and Procedure.

The Corporation's Investments.

Credits and Collections.

Budgets and Forecasts.

Taxes.

Insurance. Workmen's Compensation,
Claims, Pensions.

Research Activities, Reminder Schedules,
Intra-Department Reports.

Standard Practice Instructions.

Accounts and Accounting Methods.

Reports (Internal).

Reports (External).

Law for the Treasurer, Controller and
Auditor.

There are 578 illustrations throughout
the work, consisting of innumerable tables,
forms, ledger sheets, stock sheets and the
like. Each of these two books contains a
chapter or two dealing with the law, with
which the particular officer should be familiar.
No one denies that the officer should be
acquainted with some of these legal
matters; without the knowledge of these,
he is lost, but the treatment of legal matters
is quite scanty, from the lawyer's point of
view. Sometimes a smattering of legal
ideas may do more harm than good, and
fortunately for our profession, not every
good corporation secretary or corporation
treasurer is a good lawyer. Even though
the modern corporation executive knows
something of legal matters, he should not
because of that, deviate from the general
rule of convenience and necessity—when
in doubt let a lawyer handle it.

These two books are heartily recommended
to corporate executives and to legal advisors.
To them the value of the books will be
immediately sensed upon examination by
them; to the laymen, the books are simply
masses of technical information.

DENIALS IN PLEADINGS

(Continued from Page 19)

sets of facts and circumstances that are sometimes presented in cases, we may yet say that the foregoing is in full accord with the precept and practice of the legal profession, and the sentiments above expressed must commend themselves to every thoughtful attorney.

Gauged, therefore, by the principles of

pleading as defined herein, and the sentiments as regards the ethics, it cannot be denied that such a practice is not countenanced or permitted by the recognized rules of pleading, and is unethical.

In conclusion, it is urged that every effort be used by the Bench and Bar of this county, which will have for its result the stamping out of such a procedure as defined herein, and this will of necessity end the many evils which are attendant in matters of this kind.

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Frank M. Porter, *Chairman*
Adolph B. Rosenfield
Paul W. Jones
W. Joseph Ford
H. C. Redwine
J. W. Morin

Respectfully submitted,
GEORGE E. WALDO,
Chairman

APPEALS FROM MUNICIPAL COURTS

(Continued from Page 11)

by this section to expire without taking any steps to prepare a record thereunder. While the case was in this condition the amendments above-mentioned took effect. Thereafter and within the time fixed by the amendments, appellant attempted to obtain a record under this section. The court said that it was the desire of the legislature that, notwithstanding the abolition of the right of appeal from an order denying a new trial, opportunity should be afforded the parties in all cases to obtain a review of such order, and the provision in question should be liberally construed for that purpose, but also held that:

"Just as clearly it cannot fairly be held that it was intended to give a party who had appealed from a judgment prior to the change in the law and whose right to such a record had absolutely expired prior to such date, a right to a new record for the purpose of reviewing matters in no way germane to the question of the correctness of the disposition by the trial court of the motion for new trial, and material only to questions involved in the appeal from the judgment as the law stood before the change of August 8th. To construe the law otherwise would be to give it a retroactive effect not warranted by any rule of construction."

For the reasons stated it was held that the appellant's attempt to obtain a record came too late, but the court suggested at the same time that if he had desired only a record of the proceedings on the motion for a new trial, instead of a record of what occurred at the trial, he might perhaps have been entitled to it. The rule declared in this case seems to require a holding, as to the statutory changes now under review, that if a judgment was rendered in the municipal court, of which notice was given to the losing party, and he allowed the period of ten days from such notice to expire before July 29, 1927, without filing a statement of the case or obtaining an extension of time to do so, he absolutely

lost the right to have any record of the proceedings at the trial of such action and that right was not revived by the taking effect of these amendments on July 29, even though his motion for a new trial may have been still pending on that date; but he might perhaps be entitled to a record merely of the proceedings of the court upon the motion for a new trial.

This leaves still open the question as to the proper procedure where the appellant's right to a record had not expired on July 29, 1927. Under the general rules already stated, that the right of appeal is governed by the law in force at the time of the making of the judgment appealed from, and that statutes are not to be given a retroactive effect unless necessarily required by their language, it would seem that the record on appeal should be prepared under the law in force at the time of the making of the judgment, in the absence of some expression of a contrary intent in the amending statute. No doubt since the statutory provisions in this matter relate only to the remedy, it is well within the power of the legislature to make changes therein applicable to pending proceedings, but nothing in the statute here under consideration seems to indicate that it has done so. However, there appear to be no decisions on this precise point, so it cannot be regarded as settled.

By section 650 the time for proposing a bill of exceptions, "if proceedings on motion for a new trial be pending," is "within ten days after notice of decision denying said motion, or other determination thereof." Construing language substantially the same as this in section 953a, the supreme court held in *Bernschein v. Whitaker*, 175 Cal. 130, that where the motion for a new trial was denied by operation of law upon the failure of the trial court to pass upon it within the time allowed for that purpose, the time for giving notice to the clerk to prepare a record began to run at once upon such denial of the motion, because the provision above quoted does not call for a written notice, and the law itself gives actual notice of the termination of the proceedings for a new trial under the circumstances stated. The same rule will no doubt be applied to the time for serving a bill of exceptions under section 650.

Section 988d of the amendments contains a provision regarding dismissal of

appeals for want of prosecution and provides that every appeal shall be dismissed if the appellant fails to bring it on for hearing within six months after the record on appeal is filed in the superior court, but contains a proviso that if an appeal is properly placed on the calendar for hearing the court may continue it beyond the six months' period without losing jurisdiction. There is also a provision in the section that the time may be shortened by rule of court heretofore or hereafter adopted for that purpose. However, the period of six months thus provided seems to be reasonably short and adequate to prevent any considerable delay in the prosecution of an appeal, and the superior court of the county of Los Angeles has for that reason rescinded its former rule providing for dismissal of such appeals if not brought on for hearing within sixty days.

The provisions of section 988d regarding the dismissal of an appeal are based on the theory that it is within the power of the appellant to bring his appeal on for hearing within six months. To enable him to do this he must of course have the cooperation of the court before which the appeal is to be heard. To this end the superior court of Los Angeles County has provided by its rules that all such appeals shall be heard in department 8 (paragraph (i), sub. 3, Rule III) and that they may be brought on for hearing by either party on five days' notice to the other (Rule XLIV, sub. 1). These are special rules relating to the hearing of appeals, and according to the recognized canons of construction they prevail over the general provisions of the rules regarding the setting of cases for trial. In consequence, it is not necessary for the appellant to make a motion, either before the Presiding Judge or elsewhere, to set the case for trial or the appeal for hearing. All that is necessary is a notice duly given by either party to the other, stating in substance that in department 8 at a certain time the party giving notice will bring the appeal on for hearing, or will present the appeal to the court for decision, or any other equivalent form of words. At the time mentioned in the notice, the appeal will be taken up by the court, argument upon it will be heard,

and it will be submitted for decision without any further proceedings by the parties, subject of course to the power of the court to continue the matter to some other date, if the date selected by the moving party is not convenient to the other party, or for other reasons, and to require the filing of briefs if the questions involved seem to justify that course.

By the provisions of section 5 of article VI of the Constitution, the superior courts have appellate jurisdiction in such cases arising in municipal courts as may be prescribed by law. By section 983 of the Code of Civil Procedure this appellate jurisdiction is limited to questions of law alone. The amendment has made no change in this respect. This is substantially the same rule as that applicable to the appellate jurisdiction of the Supreme Court. By a long course of decisions it has been settled that under this rule an appellate court cannot weigh the evidence or pass upon the credibility of the witnesses, with a view to substituting its judgment for that of the trial court and making a different finding as to the facts from that reached by the trial court. An appellate court cannot make findings of fact, even on matters regarding which the trial court has failed or omitted to make a finding; and this rule is not changed when the entire evidence is before the appellate court and appears to be clear and convincing. The question whether there is any evidence sufficient to support a finding or judgment is one of law, and is always open to investigation by an appellate court. (See 2 Cal. Jur. 539 et seq., where the authorities on these points are fully reviewed.)

The amendment of 1926, by which section 434 was added to article VI of the Constitution, merely authorized the legislature to confer on the appellate courts power to make findings of fact, and therefore is not self-executing. The question whether the legislature should act on this authorization was one of policy for it to decide, and it was supposed that if it decided to do so it would adopt some general act applicable to all appellate courts. For this reason no mention was made of this subject in the amendments under discussion. In fact, however, the legislature merely passed a law applicable only to the

Supreme Court and the District Courts of Appeal. (C. C. P. 956a.) The powers of required to make findings unless they are the superior court on appeal have therefore not been enlarged by this constitutional amendment and statute, and it is still without power to make findings of fact or take evidence.

Section 988h provides that the superior court may review any intermediate order or decision which involves the merits or necessarily affects the judgment or order appealed from, and may modify any judgment or order appealed from or direct the proper judgment or order to be entered. These provisions are substantially copied from those relating to the powers of the Supreme Court on appeal, and their scope is limited by the rule above mentioned that the superior court has no power, on appeal, to make findings. By reason of this rule an appellate court cannot modify a judgment where the judgment as modified would not be supported by the findings made and would necessitate the appellate court making findings. (2 Cal. Jur. 915,

985.) Since the municipal courts are not specially requested, the record on appeal from one of their judgments does not usually afford the necessary basis for a modification of the judgment, and if error appears as to the facts it is necessary to send the case back for a new trial.

I have not attempted in this article to call attention to all of the provisions of the new law regarding appeals, but only to point out some of the more important changes. Neither have I undertaken to state any rules as to the construction and effect of the amendments except such as have already been settled by decisions of the higher courts and are therefore not likely to be subjects of argument before me if the persons concerned are advised of these decisions. No doubt other questions will be presented which will require careful consideration and can be answered only when they arise. However, I hope that even with these limitations the foregoing discussion may prove useful to those who are required to deal with appeals from the municipal courts in civil cases.

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